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**FILED**

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**CHARLES H. COOPER**  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1914**

**No. 511**

**MARKET STREET RAILWAY COMPANY,**

*Appellant,*

**vs.**

**RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANK E. HAVENNER, O. C. BAKER, ET AL, ETC.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**STATEMENT AS TO JURISDICTION**

**CYRIL APPEL,**

**FRED T. SMITH,**

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**SUPREME COURT OF THE UNITED STATES**

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**MARKET STREET RAILWAY COMPANY,**

*vs.*

*Appellant,*

**RAILROAD COMMISSION OF THE STATE OF CALIFORNIA AND FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE AND FRANK W. CLARK, THE MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,**

*Appellees*

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**STATEMENT AS TO JURISDICTION**

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This is a second appeal in the above entitled case. The facts on this appeal are identical, except that this appeal was taken after the expiration of thirty days from the filing of the decision and judgment of the Supreme Court of the State of California; the earlier appeal was taken prior to the expiration of the thirty days.

We respectfully refer to the Statement as to Jurisdiction on the first appeal for a statement of the case, the opinions below, the statutory provisions believed to sustain jurisdiction, the state statute involved, the cases believed to sustain the jurisdiction of this Court, the manner in which the federal questions were raised and passed upon, and a statement of the grounds upon which it is contended the federal questions involved are substantial. In this

statement we shall point out the problems which have led to this second appeal.

Under the opinions of this Court in

*Puget Sound Co. v. King County*, 264 U. S. 22;

*Dept. of Banking v. Pink*, 317 U. S. 264, and

*Cole v. Violette*, 319 U. S. 581,

counsel for appellant are uncertain whether, within the meaning of section 237(a) of the Judicial Code, the decision and judgment of the Supreme Court of California became final on July 27, 1944, when that court denied the petition for rehearing, or on August 1, 1944, when the thirty-day period following the filing of the decision and judgment expired. Counsel are also uncertain whether, if the decision and judgment was not final until August 1, 1944, the first appeal in this case, allowed July 31, 1944, is premature. Accordingly, to avoid any possible jurisdictional defect, and following a practice sanctioned by the decisions of this Court,<sup>1</sup> we have taken this second appeal.

The jurisdictional problem presented is important to the Bar of California. Until the decisions in *Dept. of Banking v. Pink*, 317 U. S. 264, supra, and *Cole v. Violette*, 319 U. S. 581, supra, it generally was believed that a judgment of the Supreme Court of California became final for the purposes of review by the Supreme Court of the United States upon the expiration of the thirty-day period following the filing of the decision and judgment of the state court, and that, as a corollary, the time within which an appeal or writ of certiorari might be applied for commenced to run at that time. The foregoing decisions, however, indicated that a judgment of the Supreme Court of California is final, for purposes of federal review, upon its filing, and that the time for appeal or certiorari then commences to run—unless of

<sup>1</sup> *Ohio Pub. Serv. Co. v. Fritz*, 274 U. S. 12; *Rio Grande Ry. v. Stringham*, 239 U. S. 44.

course the period is extended by timely petition for rehearing. The point however was not directly involved in either of the above decisions and it is respectfully urged that it be expressly decided on this appeal.

Under the California law and practice, a decision of the Supreme Court of California, when rendered, is filed with the clerk of the court. The decision concludes, in each case, with a statement disposing of the appeal, i. e., "the judgment is affirmed," "the judgment is reversed," or a similar appropriate order. In the case at bar the concluding statement is, "The order is affirmed." By express provision of the ~~California~~ Rules on Appeal (hereinafter quoted) the decision does not become "final" until thirty days after its filing, unless otherwise ordered by the court prior to the expiration of the thirty-day period.

Some confusion has existed in the past as to just what constitutes the "judgment" of the court; whether it be the concluding statement in the court's decision, or the remittitur which issues after the judgment becomes final. The Rules on Appeal above referred to, which became effective July 1, 1943, seem to make it clear that the concluding statement in the court's decision is its judgment. This is confirmed by the form of the remittitur, which is issued by the clerk at the expiration of the thirty-day period. The remittitur bears a certificate stating that the judgment copied therein is "a true copy of an original judgment entered in the above entitled cause" on the day the decision was filed. In the case at bar the remittitur (excluding the caption) reads as follows:

"The above entitled matter having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged and Decreed by the Court that the Order of the Railroad Commission of the State

of California, in the above entitled matter is hereby affirmed.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 1st day of July, 1944; and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 1st day of August, A. D. 1944.

A. V. HASKELL,  
Clerk,

By I. M. JOHNSON,  
Deputy."

An excellent discussion of the applicable rules, and of the finality thereunder of judgments of the Supreme Court of California, is found in an article by Mr. B. E. Witkin,<sup>2</sup> "*New California Rules on Appeal*," 17 So. Cal. L. Rev., at page 248 et seq. (March 1944).

The pertinent provisions of the Rules on Appeal are as follows:<sup>3</sup>

<sup>2</sup> Mr. Witkin is Reporter of Decisions, Supreme Court of California. He was the draftsman for the Judicial Council of the State of California of the Rules on Appeal.

<sup>3</sup> Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, adopted by the Judicial Council of California pursuant to sec. 961 of the California Code of Civil Procedure (chap. 477, Cal. Stats. 1941, as amended by chap. 4, Cal. Stats. 1943), which provides:

"The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State.

"The Judicial Council shall report the rules prescribed by it to the Legislature on or before March 31, 1943.

"The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect."

The Rules on Appeal were reported by the Judicial Council in accordance with the above statute and became effective on July 1, 1943. They are published in 22 Cal. (2d) (1).



***Rule 24. Decision on appeal***

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk. A decision of the Supreme Court becomes final 30 days after filing unless otherwise ordered prior to the expiration of said 30-day period. Pursuant to article VI, section 4c, of the Constitution, a decision of a District Court of Appeal becomes final as to that court, 30 days in civil cases and 15 days in criminal cases after filing, and thereafter is not subject to modification or rehearing by said court. When an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

. . . . .

***Rule 25. Remittitur***

(a) [Issuance and transmission] A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a District Court of Appeal shall issue the remittitur 30 days in civil cases and 15 days in criminal cases after a judgment of that court becomes final therein. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately, with a certified copy of the opinion, to the lower court or tribunal.

(b) [Issuance forthwith]. For good cause shown, or on stipulation of the parties, the Supreme Court may direct the immediate issuance of a remittitur. The District Court of Appeal may direct the immediate issuance of a remittitur on stipulation of the parties.

(c) [Stay of issuance] A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period.

(d) [Recall of remittitur] A remittitur may be recalled by order of the reviewing court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.

*Rule 27. Rehearing in court rendering decision*

(a) [Power to grant rehearing] The Supreme Court or a District Court of Appeal may grant a rehearing in any cause after its own decision; and any cause pending in a department of the Supreme Court may be ordered heard by the Supreme Court in bank. A rehearing or hearing in bank may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to the time the decision becomes final therein.

(b) [Time for filing petition] A party seeking a rehearing in a criminal case in the District Court of Appeal must serve and file a petition for rehearing within 8 days after the filing of the decision. A party seeking a rehearing in any other case, either in the District Court of Appeal or in the Supreme Court, or a hearing by the Supreme Court in bank after a decision in department, must serve and file a petition therefor within 15 days after the filing of the decision. The same number of copies shall be filed as is required by Rule 16.

(c) [Time for filing answer] In a criminal case in the District Court of Appeal, the adverse party may serve and file an answer to the petition within 11 days after the filing of the decision. In all other cases an answer may be served and filed within 23 days after the filing of the decision.

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of Rule 15.



(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least 4 justices assenting thereto, and filed with the clerk; and a hearing in bank after decision in department may be ordered as provided in article VI, section 2, of the Constitution. If no order is made before the decision becomes final, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect."

From the foregoing it appears clear that the judgment of the Supreme Court of California subject to review by this Court is the judgment which forms a part of the original decision and which is final in terms when filed. By express provision of state law, however, this judgment does not become final until thirty days after it is filed. The "non-finality" thus provided for appears to be "non-finality" in the sense that the judgment may still be modified by the court on its own motion or on the motion of the parties. At the expiration of thirty days, unless otherwise ordered prior thereto, the court becomes powerless to change or modify the judgment.

See,

*Oakland v. Pacific Coast Lumber etc. Co.*, 172 Cal. 332, 337;

*Estate of Ross*, 189 Cal. 317, 318.

While the opinions in the *Pink* and *Cole* cases, supra, indicate that the judgments of the Supreme Court of California are final for purposes of federal review when filed, and while counsel for appellant assumed that such was the rule when the first appeal herein was taken, it should be emphasized that certain practical considerations make against this conclusion.

If appeals be allowed or certiorari applied for to review California judgments prior to the expiration of the thirty-

day period, the appellate writs may become fruitless by reason of the subsequent grantings of rehearings or modifications of the judgments by the state courts. It is believed that the power of the state court so to grant rehearings or modify its judgments in accordance with the state practice cannot be affected by intervening appeals or petitions for writs of certiorari. If, on the other hand, the state practice is given effect review by this Court cannot be sought until the judgment is final in every sense. Delay is not a significant factor, for the maximum period is thirty days, and at least twenty-three days may be added in each case by the filing of a petition for rehearing (Rule 27, supra).

As is often true, more important than the manner in which the point is decided, is that it be decided.

Dated: San Francisco, California, September 20, 1944.

Respectfully submitted,

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